Case 3:23-cv-00257-SI Document 1 Filed 02/21/23 Page 1 of 19

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Shannon Berlant

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8290 SW Peters Road, Portland, OR 97224

phone: 503-335-3453

## UNITED STATES DISTRICT COURT

## DISTRICT OF OREGON

## PORTLAND DIVISION

Shannon Berlant

Plaintiff, appearing Pro Se

v.

US ELECTION ASSISTANCE COMMISSION 633 3<sup>rd</sup> Street NW, Suite 200 Washington, DC 20001

Defendant.

Case No.: 3:23-CV-257-51

PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

#### UNITED STATES DISTRICT COURT

#### DISTRICT OF OREGON

#### PORTLAND DIVISION

Shannon Berlant

Plaintiff, appearing Pro Se

v.

US ELECTION ASSISTANCE COMMISSION 633 3<sup>rd</sup> Street NW, Suite 200 Washington, DC 20001

Defendant.

Case No.: 3:23-0-257-5

PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

## **COMPLAINT**

Plaintiff brings this action against the US Election Assistance Commission under the
Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28
U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance
with the requirements of FOIA.

#### JURISDICTION AND VENUE

- 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.
- 3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).
- 4. Because Defendant has failed to comply with the applicable time-limit provisions of FOIA,
  Plaintiff is deemed to have exhausted her administrative remedies pursuant to 5 U.S.C. §

552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

## **PARTIES**

- 5. Plaintiff resides in Washington County in the state of Oregon. Plaintiff is committed to promoting transparency in government by providing records produced under her submitted FOIA(s) to an investigative journalist, thus educating the public about government activities, and ensuring accountability of government officials.
- 6. Defendant US Election Assistance Commission (EAC) is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1) headquartered in Washington, DC. EAC has possession, custody, and control of the records that Plaintiff seeks.

# **STATEMENT OF FACTS**

## February 2021 VSTL Record Requests

- 7. About February 9, 2021 Plaintiff submitted a FOIA request to EAC requesting "a copy of the most recent Certificate of Accreditation for the VSTL SLI Compliance Division of Gaming Laboratories International, LLC and a copy of the original un-modified [electronic] file dated January 16, 2018 10:32:31 am." EAC acknowledged this FOIA on March 5, 2021 and assigned it file number 21-00037. A copy of the request, along with additional clarification is attached hereto as Exhibit A.
- 8. On February 24, 2021, Plaintiff also submitted a FOIA request to EAC seeking access to the following records: "[For the years 2016 through 2020, covering both VSTLs Pro V&V as well as SLI Compliance (or under their prior names)]: (1) all original emails, with official (unedited) Certificate of Accreditation as attachment to both VSTLs. (3) all EAC

- [C]ommissioner meeting minutes, where VSTL accreditation was discussed. (4) all applications for accreditation renewal or supplemental information the VSTLs provided to the EAC." EAC acknowledged this FOIA on March 23, 2021 and assigned it file number 21-00040. A copy of the request is attached hereto as Exhibit B.
- January 4, 2022 Ms. Amanda Joiner (with the EAC) advised that responsive records under file number 21-00037 were estimated to be produced in July 2022; and further that responsive records under file number 21-00040 were estimated to be produced in August 2022.
- 10. June 20, 2022 Camden Kelliher (with the EAC) advised that responsive records under file number 21-00037 were estimated to be produced in September 2022; and further that responsive records under file number 21-00040 were estimated to be produced in October 2022.
- 11. October 18, 2022 Camden Kelliher (with the EAC) advised that responsive records under file numbers 21-00037 and 21-00040 are estimated to be produced in March 2023.
- 12. At the time of this filing, Plaintiff has not received further communication from the EAC claiming exemption(s), nor records being withheld, nor full record production for either FOIA file numbers 21-00037 and 21-00040.

# June 2022 VSTL Record Request

13. June 30, 2022 Plaintiff submitted a FOIA request to EAC requesting "For the VSTL Pro V&V, it appears from publicly available documents that Pro V&V's accreditation expired in 2017. If Pro V&V followed the VSTL manual, their application package to renew their accreditation should have been submitted by March 26th, 2017. Please provide any of Pro V&V's application package(s) for renewal that is between 12/1/2016 thru 11/3/2020". EAC

- acknowledged this FOIA on July 6, 2022 and assigned it file number 22-00071. A copy of the request is attached hereto as Exhibit C.
- 14. At the time of this filing, Plaintiff has not received further communication from the EAC claiming exemption(s), nor records being withheld, nor full record production for FOIA file number 22-00071.

## July 2022 VSTL Record Requests

- 15. July 1, 2022 Plaintiff submitted a FOIA request to EAC requesting "[an] electronic copy of the EAC's Certificate of Accreditation for the VSTL named NTS that covers the years 2011-2015". EAC acknowledged this FOIA on July 11, 2022 and assigned it file number 22-00076. A copy of the request is attached hereto as Exhibit D.
- 16. July 30, 2022 Plaintiff submitted a FOIA request to EAC requesting "[1] As far as the EAC's records on VSTL accreditation, please provide a copy of every certificate issued for every VSTL between 2006-2019; [2] As far as the EAC's records on VSTL accreditation, please provide every letter the EAC issued to any VSTL, with regards to REVOCATION of their accreditation for the years 2006-2019. This doesn't necessarily need to include all the back and forth between the EAC and a VSTL, but all those the EAC issued that initially advised the VSTL of revocation; then all those that the EAC issued that finalized revocation". EAC acknowledged this FOIA on August 12, 2022 and assigned it file number 22-00165. A copy of the request is attached hereto as Exhibit E.
- 17. At the time of this filing, Plaintiff has not received further communication from the EAC claiming exemption(s), nor records being withheld, nor full record production for FOIA file numbers 22-00076 or 22-00165.

#### August 2022 Record Requests

18. August 13, 2022 Plaintiff submitted a FOIA request to EAC requesting "a copy of the ECO Analysis for ES&S 1141. The short description from [the EAC] website states:

"This ECO addresses the Critical Vulnerability CVE-2021-34527, also known as PrintNightmare, in the Windows Operating System. It also updates antivirus definitions for the applicable EVS systems."

The record that I would like to receive a copy of is the VSTL lab analysis and/or report from Pro V&V for the detailed information on the change". EAC acknowledged this FOIA on August 17, 2022 and assigned it file number 22-00174. A copy of the request is attached hereto as Exhibit F.

- 19. August 13, 2022 Plaintiff submitted a FOIA request to EAC requesting "all communication(s) from any VSTL and/or vote system manufacturer that submitted a request for clarification, which lead to the EAC issuing NOC 21-01". EAC acknowledged this FOIA on August 17, 2022 and assigned it file number 22-00175. A copy of the request is attached hereto as Exhibit G.
- 20. August 17, 2022 Plaintiff submitted a FOIA request to EAC requesting "[for SysTest Labs, SLI Global Solutions and SLI Compliance, provide] a copy of the company ownership information and organizational chart both before and after the company name changes". EAC acknowledged this FOIA on September 15, 2022 and assigned it file number 22-00188. A copy of the request is attached hereto as Exhibit H.
- 21. At the time of this filing, Plaintiff has not received further communication from the EAC claiming exemption(s), nor records being withheld, nor full record production for FOIA file numbers 22-00174 or 22-00175 or 22-00188.

Exhaustion of Administrative Remedies

- 22. As of the date of this complaint, Defendant has failed to (a) notify Plaintiff of any determinations regarding her FOIA requests, including the scope of any responsive records Defendant intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.
- 23. Through Defendant's failure to make determinations as to Plaintiff's FOIA requests within the time period required by law, Plaintiff has constructively exhausted her administrative remedies and seeks immediate judicial review.

# COUNT 1 Violation of FOIA, 5 U.S.C. § 552 Failure to Conduct Adequate Searches for Responsive Records

- 24. Plaintiff repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.
- 25. Plaintiff properly requested records within the possession, custody, and control of EAC.
- 26. EAC is an agency subject to FOIA, and it must therefore make reasonable efforts to search for requested records.
- 27. EAC has failed to promptly review agency records for the purpose of locating those records that are responsive to Plaintiff's FOIA requests.
- 28. EAC's failure to conduct adequate searches for responsive records violates FOIA and EAC regulations.
- 29. Plaintiff is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to Plaintiff's FOIA requests.

# COUNT 2 Violation of FOIA, 5 U.S.C. § 552

## Wrongful Withholding of Non-Exempt Responsive Records

- 30. Plaintiff repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.
- 31. Plaintiff properly requested records within the possession, custody, and control of EAC.
- 32. EAC is an agency subject to FOIA, and it must therefore release, in response to a FOIA request, any non-exempt records and provide a lawful reason for withholding any materials.
- 33. EAC is wrongfully withholding non-exempt agency records requested by Plaintiff by failing to produce non-exempt records responsive to her FOIA requests.
- 34. Plaintiff is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption.

## REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests the Court to:

- Order Defendant to conduct a search reasonably calculated to uncover all records responsive to Plaintiff's FOIA requests identified in this Complaint;
- 2. Order Defendant to produce, within ten days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiff's FOIA requests and indexes of any responsive records withheld under claim of exemption;
- Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA requests;

- 4. Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E);
- 5. Should Plaintiff not utilize an attorney (as described in point 4 above) for the duration of the proceeding, Plaintiff asks this honorable Court to award Plaintiff reasonable compensation for her time and expense in the amount of \$3,000; and
- 6. Grant Plaintiff such other relief as the Court deems just and proper.

Respectfully submitted this 21<sup>st</sup> day of February 2023.

/s/ Shannon Berlant 8290 SW Peters Road Portland, Oregon 97224

#### ACKNOWLEDGEMENT

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Shannon Berlant

STATE OF OREGON
) SS.
COUNTY OF WASHINGTON (5)

WASHINGTON (1)

On this <u>Zist</u> day of <u>reb</u> <u>2023</u> before me personally appeared Shannon Berlant, who being by me duly sworn did say that they are the Petitioner named in the above-captioned action an acknowledged to me that the allegations contained therein are true according to their best knowledge and belief.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

Sune 21 2025
My Commission expires

OFFICIAL STAMP
ALLYSSAH BROWN
NOTARY PUBLIC - OREGON
COMMISSION NO. 1013748
MY COMMISSION EXPIRES JUNE 21, 2025

February 9, 2021

U.S. Election Assistance Commission Attn: Public Information / FOIA Office 633 3<sup>rd</sup> Street N.W., Suite 200 Washington, DC 20001

**RE: Voting Systems Testing Laboratories and Manuals** 

To Whom It May Concern,

First, please know that I submitted this request for information, directly on your website contact form here - https://www.eac.gov/jerome-lovato

Your current webpage <a href="https://www.eac.gov/voting-equipment/certified-voting-systems">https://www.eac.gov/sites/default/files/eac assets/1/28/Cert.Manual.4.1.15.FINAL.pdf</a>). Is this the most recent version of this manual, or is there a more recent one? I ask, because a different part of your website (this webpage <a href="https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl">https://www.eac.gov/sites/default/files/eac assets/1/28/Cert.Manual.4.1.15.FINAL.pdf</a>). Is this the most recent version of this manual, or is there a more recent one? I ask, because a different part of your website (this webpage <a href="https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl">https://www.eac.gov/sites/default/files/eac assets/1/6/Cert Manual (linked text points to <a href="https://www.eac.gov/sites/default/files/eac assets/1/6/Cert Manual 7 8 15 FINAL.pdf">https://www.eac.gov/sites/default/files/eac assets/1/6/Cert Manual 7 8 15 FINAL.pdf</a>). I would like you to forward the current version of this manual which was in effect as of 11/3/2020; AND, the current manual effective as of today, February 9, 2021. Please send both and make it clear which is which.

The second issue I am writing you about has to do with the current Certificate of Accreditation for the VSTL SLI Compliance Division of Gaming Laboratories International, LLC dated January 10, 2018 signed by Brian Newby. (linked in the text of this page <a href="https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/sli-compliance-division-gaming-laboratories">https://www.eac.gov/sites/default/files/voting\_system\_test-laboratories</a> and points to this document <a href="https://www.eac.gov/sites/default/files/voting\_system\_test\_lab/files/SLI\_Compliance\_Certificate\_of\_Accreditation011018.pdf">https://www.eac.gov/sites/default/files/voting\_system\_test\_lab/files/SLI\_Compliance\_Certificate\_of\_Accreditation011018.pdf</a>). Please provide a copy of the most up-to-date certificate, as this certificate expired January 10, 2020. Also, the meta data on the file at the captioned document link indicates that the file was created January 16, 2018 10:32:31 am, yet the file was modified November 6, 2019 10:53:44 am. Please forward a copy of the original, un-modified file dated January 16, 2018 10:32:31 am.

Thank you for your attention to this matter.

Sincerely,



## **United States Election Assistance Commission**

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| File name: | SLI\_Compliance\_Certificate\_of\_Accreditation\_1-10-2018-1.pdf | File size: | 268 KB (274,874 bytes)

Title: Author: SLI Compliance Certificate of Accreditation

BrianHancock

Subject: -Keywords: -

 Creation Date:
 1/16/2018, 10:32:31 AM

 Modification Date:
 11/6/2019, 10:53:44 AM

 Creator:
 Microsoft® Publisher 2010

PDF Producer: PDF Version: Microsoft® Publisher 2010

PDF Version: 1.4 Page Count: 1

Page Size: 279.4 × 215.9 mm (Letter, landscape)

Fast Web View: Yes

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January 10, 2021

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Date: 1/10/18

Brian Newby, Executive Director, U.S. Election Assistance Commission

EAC Lab Code: 0701

#### Public Record Request - FOIA



To: ajoiner@eac.gov

Date: Wednesday, February 24, 2021 at 02:42 PM PST

#### Ms. Joiner,

For both VSTLs Pro V&V, as well as <u>SLI Compliance (and under their previous names)</u> - please provide:

- 1) From 2016 thru December 2020 all original emails, with official EAC-issued (unedited) Certificate of Accreditation as attachment to both listed VSTLs
- 2) From 2016 thru December 2020 -all original (unedited) EAC-issued Certificate of Accreditation for the listed VSTLs
- 3) From 2016 thru December 2020 all EAC commissioner meeting minutes, where VSTL accreditation was discussed
- 4) From 2016 thru December 2020 all applications for accreditation renewal or supplemental information the VSTLs provided to the EAC

Thank you, Shannon Berlant 503,335,3453

# 

## **FOIA**

From: M B (sinberlant@yahoo.com)

To: ckelliher@eac.gov

Date: Thursday, June 30, 2022 at 10:59 AM PDT

Hello Camden,

This is a public record request under FOIA.

For the VSTL Pro V&V, it appears from publicly available documents that Pro V&V's accreditation expired in 2017. If Pro V&V followed the VSTL manual, their application package to renew their accreditation should have been submitted by March 26th, 2017. Please provide any of Pro V&V's application package(s) for renewal that is between 12/1/2016 thru 11/3/2020.

#### **NEW FOIA**

From: ( I & (smberlant@yahoo,com)

To: ckelliher@eac.gov

Date: Friday, July 1, 2022 at 03:11 PM PDT

Hello Camden,

This is a request for public records under FOIA. At your earliest convenience, please provide and electronic copy of the EAC's Certificate of Accreditation for the VSTL named NTS that covers the years 2011-2015

#### **NEW FOIA**

ckelliher@eac.gov

Date: Saturday, July 30, 2022 at 11:54 AM PDT

Hello Camden,

This is a request for public records under FOIA.

- 1) As far as the EAC's records on <u>VSTL accreditation</u>, please provide a copy of every certificate issued for every VSTL between 2006-2019.
- 2) As far as the EAC's records on VSTL accreditation, please provide every letter the EAC issued to any VSTL, with regards to REVOCATION of their accreditation for the years 2006-2019. This doesn't necessarily need to include all the back and forth between the EAC and a VSTL, but all those the EAC issued that initially advised the VSTL of revocation; then all those that the EAC issued that finalized revocation.

Thank you!

## New FOIA

From: S M B (smberlant@yahoo com)

To: ckelliher@eac.gov

Date: Saturday, August 13, 2022 at 10:01 AM PDT

Hello.

This is a request for public records under FOIA.

Please provide a copy of the ECO Analysis for ES&S 1141. The short description from your website states: "This ECO addresses the Critical Vulnerability CVE-2021-34527, also known as PrintNightmare, in the Windows Operating System. It also updates antivirus definitions for the applicable EVS systems."

The record that I would like to receive a copy of is the VSTL lab analysis and/or report from Pro V&V for the detailed information on the change.

Thank you,

Shannon Berlant

# 

#### New FOIA

From: M.B.ismberlant@yahsa.com

To: ckelliher@eac.gov

Date: Saturday, August 13, 2022 at 10:34 AM PDT

Hello,

This is a request for public records under FOIA.

I would like a copy of all communication(s) from any VSTL and/or vote system manufacturer that submitted a request for clarification, which lead to the EAC issuing NOC 21-01 (https://www.eac.gov/sites/default/files/2021-07/NOC%2021.01\_VSTL%20Accreditation%20Status\_1.pdf)

#### **New FOIA**

From: Stri D (surberlant@yaboo.com)

To: ckelliher@eac.gov

Date: Wednesday, August 17, 2022 at 02:27 PM PDT

Hello,

This is a request for public records under FOIA.

At your earliest convenience, please provide a copy of the <u>company ownership information and organizational chart both before and after the company name changes</u>. I am referring to SysTest Labs, SLI Global Solutions and SLI Compliance.

see: <a href="https://www.eac.gov/sites/default/files/voting\_system\_test\_lab/files/SLIGlobal\_Itr\_name\_change-10.01.10.pdf">https://www.eac.gov/sites/default/files/voting\_system\_test\_lab/files/SLI%20Org%20Updates%20EAC%202016-01-11.pdf</a>